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DEC 16

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET ALS., APPELLEE.

APPELLEES' BRIEF IN OPPOSITION TO APPELLANT'S MOTIONS AND CONSENTS TO MAKE AETNA CASUALTY & SURETY COMPANY A PARTY APPELLANT, AND TO AMEND PROCEEDINGS ON APPEAL.

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HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET ALS., APPELLEE.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

APPELLEES' BRIEF IN OPPOSITION TO APPELLANT'S MOTIONS AND CONSENTS TO MAKE AETNA CASUALTY & SURETY COMPANY A PARTY APPELLANT, AND TO AMEND PROCEEDINGS ON APPEAL.

In the within entitled cause the Hartford Accident & Indemnity Company, Appellant, appealed to the Supreme Court of the State of Mississippi from an

adverse judgment rendered against it by the Chancery Court of Adams County, Mississippi (R. 58).

The judgment of the Chancery Court was affirmed as to the appellees here against the appellant and against the surety on the supersedeas appeal bond from the said Chancery Court to the Supreme Court of the State of Mississippi, to-wit: Aetna Casualty & Surety Company (Bottom R. 75).

The judgment rendered by the Mississippi Supreme Court was a joint judgment against the appellant, Hartford Accident & Indemnity Company, Principal, and its surety, Aetna Casualty & Surety Company (Bottom R. 79).

The Hartford Accident & Indemnity Company alone filed a Suggestion of Error in the Mississippi Supreme Court, suggesting that the former opinion be corrected and reversed.

This Suggestion of Error was not joined in by Aetna Casualty & Surety Company (R. 83).

The Suggestion of Error having been overruled the joint judgment became final on June 15th, 1931 (R. 90).

A petition for appeal to the Supreme Court of the United States was filed on July 25th, 1931, by the Hartford Accident & Indemnity Company only, and this petition was not joined in by Aetna Casualty & Surety Company (R. 91).

There was an Assignment of Errors filed on July 25th, 1931, in the Supreme Court of Mississippi by Hartford Accident & Indemnity Company in connection with its petition for the allowance of an appeal to the Supreme Court of the United States, but this

Assignment of Errors was not joined in by Aetna Casualty & Surety Company nor did the Aetna Casualty & Surety Company file a separate petition for appeal or Assignment of Errors (R. 92).

On July 25th, 1931, there was an order granting an appeal from the Supreme Court of the State of Mississippi to the United States Supreme Court to the Hartford Accident & Indemnity Company, but there was no such order in favor of Aetna Casualty & Surety Company (R. 95).

The Hartford Accident & Indemnity Company addressed a Praecipe for transcript of record on July 25th, 1931, to the Clerk of the Supreme Court of Mississippi (R. 96).

The record discloses that copy of this Praecipe was served on all appellees, but none was served upon the Aetna Casualty & Surety Company nor did the Aetna Casualty & Surety Company join in the Praecipe, as disclosed by the Record.

The Record at page 100 discloses a statement of points to be relied upon by Hartford Accident & Indemnity Company, and there was an acknowledgment of service of the statement of points by all appellees (R. 102) but nowhere is there a statement of points to be relied upon by Aetna Casualty & Surety Company nor any record of service thereof upon the Aetna Casualty & Surety Company.

The time to apply for Writ of Error and appeal by any party, including the Aetna Casualty & Surety Company, has now passed, since more than three months have elapsed since the entry of the judgment or decree of the Supreme Court of the State of Missis-

sippi in this cause. In fact the time elapsed on September 15th, 1931 (R. 86).

See 43 *Statutes at Large*, 940; U. S. C. A., Title 28, Section 350.

And the requirement that application for appeal must be made within three months is mandatory and jurisdictional and cannot be avoided by consent, waiver or order of the Court.

Rust v. *Jackson*, 250 U. S. 76; 63 L. Ed. 851.

Scale Co. v. *Computive Scale Co.*, 261 U. S. 399; 67 L. Ed. 719.

Robie v. *Hart, Shaffner & Marx*, 40 Fed. (2) 871.

American Baptist Home Mission Society v. *Barnett et al.* (Circuit Court of Appeals, Second Circuit), 26 Fed. (2) 350; certiorari denied 278 U. S. 626; 73 Law Edn. 546.

The appellees filed in this Court a motion to dismiss the appeal herein, and the first point as the basis of said motion was that the judgment rendered in the Supreme Court of Mississippi was a joint judgment against Hartford Accident & Indemnity Company and Aetna Casualty & Surety Company, surety on the appeal bond, and that no appeal has been taken by the Aetna Casualty & Surety Company, and hence there is no jurisdiction of the appeal at the instance of Hartford Accident & Indemnity Company alone.

It was not until this motion to dismiss or affirm was filed in this Court that Aetna Casualty & Surety Company moved for joinder in appeal in this Court.

> "It is well settled that all parties against whom a judgment of the kind hereinabove shown

is entered must join in an appeal or formerly in a writ of error in event that any one of them takes out such appeal or writ of error; or else there must be a proper summons and severance in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

Williams v. *Bank of United States*, 24 U. S. (11 Wheaton) 414; 6 Law Edn., 508.

And as in the present case here on appeal:

"Where a judgment is distinctly one against a defendant and his surety on a bond, jointly, for a definite sum of money, and there is nothing distinctive in the judgment, all the parties against whom the judgment is entered must join in a writ of error or appeal, or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

Z. N. Estis v. *Trabue Davis & Co.*, 128 U. S. 225; 32 Law Edn. 437; 9 Sup. Ct. Rep. 58.

"A general judgment rendered against the original defendant in a case and the surety on a supersedeas bond given by it is joint, and such original defendant cannot alone review the same by writ of error, without summons and severance as to its co-defendant."

Lamon v. *Speer Hardware Co.*, 190 Fed. 734; 111 C. C. A. 462.

Humes v. *Chattanooga Third National Bank*, 54 Fed. 917; 4 C. C. A. 668.

See also *D. L. Thomas* v. *John D. Wyatt*, 17 Miss. (9 S. & M.) 308.

The Aetna Casualty & Surety Company motion comes now too late.

> "Belated appearance of necessary party appellant and request to join as an appellant is not equivalent to summons and severance within rule requiring joinder in appeal of all parties affected by decree or exclusion by severance of those failing to join after summons or notice."
>
> *American Baptist Home Mission Society* v. *Barnett et al.*, 26 Fed. (2) 350; certiorari denied 278 U. S. 626; 73 Law Edn. 546.

> "Where there is a substantial defect in a writ of error, which this Court cannot amend, it has no jurisdiction."
>
> *Wilson* v. *Life & Fire Ins. Co.*, 37 U. S. (12 Peters) 140; 9 Law Edn. 1032.

It will then of its own motion dismiss the case without awaiting the action of a party.

Hilton v. *Dickenson*, 108 U. S. 165, 168; 27 Law Edn. 688, 689.

Even of the Court could otherwise allow an amendment the fact that the statute has run would prevent its doing so in the present case.

Estis v. *Trabue Davis & Co.*, 128 U. S. 225; 32 Law Edn. 437.

Wilson v. *Fire & Life Ins. Company*, 37 U. S. (12 Peters) 140; 9 Law Edn. 1032.

The Supreme Court of Mississippi has never allowed this appeal to Aetna Casualty & Surety Co. and consent does not confer jurisdiction. *Mills* v. *Brown*, 16 Pet. 525; 10 L. Ed. 1055.

We, therefore, respectfully submit that the motion by Aetna Casualty & Surety Company to amend proceedings should be disallowed and overruled and that the appeal of Hartford Accident & Indemnity Company should be dismissed.

Respectfully submitted,

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I acknowledge receipt of copy of this Brief.

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